



ONTARIO

REPORT
on
PROPOSED EXTENSION OF
GUARANTOR'S LIABILITY
ON CONSTRUCTION BONDS

ONTARIO LAW REFORM COMMISSION

1966

DEPARTMENT OF THE ATTORNEY GENERAL

ONTARIO LAW REFORM COMMISSION
TO BE RETURNED TO COMMISSION FILES

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H. ALLAN LEAL, Q.C., LL.M., LL.D., *Chairman*

HONOURABLE JAMES C. McRUER, S.M., LL.D.

HONOURABLE RICHARD A. BELL, P.C., Q.C.

W. GIBSON GRAY, Q.C.

WILLIAM R. POOLE, Q.C.

Dr. Richard Gosse, Q.C., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada.



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ONTARIO LAW REFORM COMMISSION

COMMISSIONERS

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PARLIAMENT BUILDINGS
TORONTO 2

TO THE HONOURABLE A. A. WISHART, Q.C.,
ATTORNEY GENERAL FOR ONTARIO.

Dear Mr. Attorney:

RE PROPOSED EXTENSION OF GUARANTOR'S LIABILITY
ON CONSTRUCTION BONDS

During the consideration of proposed amendments to *The Mechanics' Lien Act*, the Commission received submissions from the All Canada Insurance Federation to the effect that the Act should be amended to give wage earners, material men and subcontractors a cause of action against a surety on a performance bond when the principal defaults in any obligation to the claimant. In its report dated February 22, 1966, with reference to amendments to *The Mechanics' Lien Act*, the Commission referred to these submissions, (see page 44) and appended to the report a suggestion that had been received for amendment to *The Mechanics' Lien Act*. The Commission drew attention to legislation that has been passed in Manitoba (see *The Guarantors' Liability Act*, Statutes of Manitoba 1965, c. 30) and in British Columbia (see *Laws Declaratory Amendment Act*, R.S.B.C. 1960, c. 213, as amended in 1964, c. 27, s. 3) and the provisions of *The Public Works Creditors Payment Act* (Statutes of Ontario 1962-63, c. 121). The Commission stated that the relevant departments of government should be consulted before any final recommendation was made. Following the submission of our report with reference to the amendment to *The Mechanics' Lien Act*, the Commission, through its Counsel, communicated with the Department of Highways, the Department of Public Works, the Ontario Water Resources Commission and the Hydro-Electric Power Commission of Ontario. Submissions were received from the Department of Highways, the Ontario Water Resources Commission and the Department of Public Works. A brief presented to the Prime Minister and the

Attorney General by the Ontario Federation of Construction Associations, in January, 1965 has also received attention. Some opposed the proposed legislation; others felt that it would not give a wide enough coverage.

We do not think that the proposed amendment should be incorporated in *The Mechanics' Lien Act*, but that the subject should be dealt with by separate legislation as was done in Manitoba and British Columbia.

We agree in principle that where a surety performance bond on a construction contract has been taken out and default has been made on the construction contract, the subcontractors, material men and wage earners should have the right to assert a claim directly against the surety. Those who have contributed to the performance of the contract without having been paid for material supplied or services rendered should have a first claim on the bond and not be left to rank with ordinary creditors of the defaulting contractor or to rely entirely on Mechanics' Lien procedure. It is to be emphasized that the proposed legislation should cover private contracts for construction as well as contracts for construction entered into on behalf of the Crown.

For convenience a copy of the suggested amendment to *The Mechanics' Lien Act* is attached hereto as Schedule A.

We make no specific recommendations with respect to the form of the legislation but we do recommend that legislation giving effect to this report be passed. If this recommendation is accepted in principle the proposed legislation may be useful as a guide for Legislative Counsel.

Any legislation should preserve the rights of claimants to relief under *The Mechanics' Lien Act* and should preserve the rights of the principal in any action brought against the surety and should also preserve the rights of the surety to subrogation. Reference is made to subsection 4 of section 3, subsection 1 of section 5 and section 6 of the Manitoba Act.

All of which is respectfully submitted,

JAMES C. McRUER,
Chairman.

H. ALLAN LEAL,
Commissioner.

RICHARD A. BELL,
Commissioner.

W. GIBSON GRAY,
Commissioner.

WILLIAM R. POOLE,
Commissioner.

May 30th, 1966.

SCHEDULE A

SUGGESTED AMENDMENTS TO THE MECHANICS' LIEN ACT

49.—(1) A claimant under a labour and material payment bond that guarantees payment to the claimant as defined therein and subject to the terms and conditions contained therein shall have a cause of action against the surety named in such bond in the event that the principal named in the bond defaults in any obligation with respect to payment to such claimant. Such action shall be on his own behalf and on behalf of all other claimants to recover the amount of the claim or claims and any moneys recovered shall be solely for the benefit of the claimants.

(2) In an action against a surety under this section the Judge may give judgment in favour of each claimant who is entitled to recover under the bond and subject to the provisions of subsection 3 of this section all moneys recovered under the judgment shall be distributed *pro rata* among the claimants in whose favour the judgment is given.

(3) Nothing in this section makes the surety liable for an amount in excess of the amount which he undertakes to pay under the bond and the surety's liability under the bond shall be reduced by and to the extent of any payment made in good faith to claimants either before or after judgment is obtained against the surety.

(4) Every principal named in a payment bond shall display and keep displayed in a conspicuous place on the work a notice giving information to the effect that a payment bond has been provided, the name and address of the principal, surety and obligee and the requirements for asserting such cause of action against the surety.

(5) A person who fails to comply with subsection (4) is guilty of an offence and on summary conviction is liable to a fine of not less than \$10.00 and not more than \$100.00 for each day during which default continues.

(6) The surety, upon satisfaction of its obligation to any claimant under the payment bond, shall be subrogated to all rights of such claimant.

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